

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: July 11, 2001

Case No.: **2000-INA-302**
CO No.: **P2000-MD-03332587**

In the Matter of:

CHESAPEAKE CENTER
Employer,

on behalf of

JOSE F. GONZALEZ
Alien.

Appearance: Zulma I. Martinez, Esq.
Marcus Hook, Pennsylvania

Certifying Officer: Richard E. Panati
Philadelphia, Pennsylvania

Before: Vittone, Burke and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam: This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of sprinkle irrigation equipment mechanic.¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

¹ Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On January 14, 1998, Chesapeake Center ("Employer")² filed an application for labor certification to enable Jose F. Gonzalez ("Alien") to fill the position of Sprinkle Irrigation Equipment Mechanic. (AF 23). Two years of experience in the job offered were required.

By letter dated December 28, 1999, the Department of Labor, Licensing and Regulation submitted the name, address and telephone number of one U.S. applicant for Employer to contact, as a result of the job being advertised. (AF 19-20). On March 9, 2000, the Certifying Officer (CO) issued a Notice of Findings ("NOF") proposing to deny certification due to Employer's unlawful rejection of a U.S. worker. (AF 15).³ Specifically, the CO found that while one U.S. worker had been referred to Employer, Employer having been provided the applicant's telephone number and address, Employer had failed to provide a result of recruitment statement for that applicant. The CO questioned the efforts made by Employer to contact the applicant, noting that a failure to contact applicants was considered untimely contact and was also indicative of a lack of "good faith" recruitment. If telephone contact had not been successful, the CO directed that at a minimum, a certified letter should have been sent to the applicant.

Employer submitted rebuttal on April 13, 2000. (AF 9). Therein, Employer asserted that it was merely sent the U.S. applicant's name and date of application, with no telephone number, address or resume. Therefore, Employer was unable to contact the applicant. Employer's counsel claims that she was able to locate the applicant's telephone number, and while Employer did telephone the applicant and leave messages on his answering machine, the applicant did not contact Employer.

A Final Determination ("FD") was issued on July 26, 2000. (AF 7). Therein, the CO denied certification, finding that the Employer was in fact provided with the applicant's telephone number and address by letter dated December 28, 1999. The CO found that a certified letter, at a minimum, would have been acceptable proof of an adequate effort to contact this U.S. applicant. As Employer failed to show that the U.S. applicant was not able, willing, qualified or available for the job opportunity, it was determined that Employer's rejection of this applicant was for other than lawful job related reasons.

On August 23, 2000, Employer requested review of the denial of labor certification. (AF 4).

²In its brief before the Board, counsel for Employer indicates that Chesapeake Center is under new ownership, but that the new owners wish to continue to pursue the labor certification application. In view of the disposition below, it is not necessary, however, to consider the impact of a change in ownership.

³ A second issue raised in the NOF was successfully rebutted, and therefore will not be addressed herein.

DISCUSSION

Initially, it must be noted that in its Request for Review, and in its Statement of Position, Employer has attempted to submit additional facts and legal argument since the FD was issued. Section 656.26(b)(4) provides that the request for administrative-judicial review "shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." This Board is strictly an appellate body; our decision must be based only on the record on which the CO reached a decision, and on arguments submitted in any brief or position statement by the parties. Evidence first submitted before the Board may not be considered. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Therefore, the additional evidence submitted by Employer after the FD was issued shall not be considered herein.

An Employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an Employer which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§ 656.1, 656.2(b). Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*).

In the instant case, upon receiving the address and telephone number of the one U.S. applicant, Employer claims to have telephoned this applicant and left a telephone message, but admits to having done nothing further. Employer provided no verification of the telephone call made to the applicant, however, claiming that the information supplied by the State office with regard to that applicant was incomplete, and claiming that the one attempt to telephone the applicant was "all that could reasonably be done in the circumstances." Employer's argument in this respect, however, is without merit, and does not negate its obligation to make a good faith effort to recruit this U.S. worker.

Employer's one alleged telephone call which did not even result in personal contact with the U.S. applicant cannot meet Employer's obligation to try an alternative means of contact should the initial attempt fail. See *Jacob Breakstone*, 1994-INA-534 (Aug. 1, 1996). Employer's failure to document this one alleged attempt to contact the U.S. applicant, and its failure to document any attempt to obtain an address for the applicant, assuming one accepts Employer's argument that no address was given it, constitute evidence of a lack of a good faith recruitment effort. Accordingly, we find that the CO's denial of labor certification was proper, and the following order shall enter:

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

Entered at the direction of the panel:

Todd R. Smyth,
Secretary to the Board of Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.